STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|---|---|---|
| CONSULTING MANAGEMENT AND EDUCATION, INC., d/b/a GULF COAST NURSING AND REHABILITATION CENTER, | ) | |
| Petitioner, | ) | |
| vs. | ) | CASE NO. 96-3593RX |
| AGENCY FOR HEALTH CARE ADMINISTRATION | ) | |
| Respondent. | ) | |

FINAL ORDER

On August 30, 1996, a formal administrative hearing was held in this case in Tallahassee, Florida, before Richard Hixson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alfred W. Clark, Esquire
Post Office Box 623
Tallahassee, Florida 32302

For Respondent: Wayne Mitchell, Esquire
Kim A. Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Suite 3400
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue for determination in this case is whether certain provisions of the Florida Title XIX Long-Term Care Reimbursement

Plan, as adopted in Rule 59G-6.010, Florida Administrative Code, which are relied upon by the AGENCY FOR HEALTH CARE ADMINISTRATION to apply a fair rental value system of property reimbursement to Petitioner are invalid under Section 120.56, Florida Statutes (1995). Petitioner also asserts a state and federal constitutional equal protection challenge to the existing rule provisions. (Petitioner's constitutional issues are preserved, but are not determined in this proceeding.)

PRELIMINARY STATEMENT

On December 14, 1995, Petitioner, CONSULTING MANAGEMENT AND EDUCATION, INC., d/b/a GULF COAST NURSING AND REHABILITATION CENTER (CME), in Case No. 95-6042, filed a Petition for Formal Administrative Proceeding pursuant to Section 120.57(1), Florida Statutes, disputing the proposed action of Respondent, AGENCY FOR HEALTH CARE ADMINISTRATION (AHCA), to calculate the property component of CME's Medicaid reimbursement under the fair rental value system (FRVS), instead of the "cost" method. On January 11, 1996, the parties filed an agreed motion for abeyance, and Case No. 95-6042 was placed in abeyance until March 31, 1996. On March 29, 1996, CME filed a motion to schedule final hearing, and Case No. 95-6042 was scheduled for final hearing on August 30, 1996.

On August 2, 1996, CME filed in the above-styled Case No. 96-3593RX, a Petition for the Administrative Determination of

the Invalidity of a Rule under Section 120.56, Florida Statutes. Pursuant to the agreed motion of the parties, Cases Nos. 95-6042 and 96-3596RX were consolidated for hearing.

On August 22, 1996, AHCA filed a motion for partial summary order or for dismissal of the state and federal constitutional claims alleged in Paragraph 26 of the Petition. As indicated above, those issues are preserved, but not determined in this proceeding. See Department of Environmental Regulation v. Leon County, 344 So.2d 297 (Fla. 1st DCA 1977).

On August 28, 1996, the parties filed a Prehearing Stipulation. Pertinent stipulated facts and conclusions are incorporated herein.

At hearing on August 30, 1996, Petitioner presented the testimony of two witnesses, Paul Parker and Joseph D. Mitchell, qualified as an expert in health care finance, and Medicaid and Medicare reimbursement. Joint Exhibit 1, the Florida Title XIX Long-Term Care Reimbursement Plan, (Florida Medicaid Plan) was received in evidence. Petitioner also presented five exhibits which were received in evidence.

Respondent presented the testimony of two witnesses, John Owens, qualified as an expert in Medicaid rate reimbursement, and Frank B. Hughes, qualified as an expert in Medicaid cost reimbursement for application of the Florida Medicaid Plan.

Respondent presented four exhibits which were received in evidence.

On October 14, 1996, a transcript of the proceedings was filed. Pursuant to the parties' request for extension of time, the parties filed proposed recommended and final orders on January 3, 1997.

## FINDINGS OF FACT

1. Petitioner, CONSULTING MANAGEMENT AND EDUCATION, INC., d/b/a GULF COAST NURSING AND REHABILITATION CENTER (CME), is the licensed operator of a 103-bed nursing home in Clearwater, Florida, which is presently known as GULF COAST NURSING AND REHABILITATION CENTER (GULF COAST). CME participates in the Florida Medicaid Program as an enrolled provider.

2. Respondent, AGENCY FOR HEALTH CARE ADMINISTRATION (AHCA), is the agency of the State of Florida authorized to implement and administer the Florida Medicaid Program, and is the successor agency to the former Department of Health and Rehabilitative Services, pursuant to Chapter 93-129, Laws of Florida.

### Stipulated Facts

3. Prior to 1993, the GULF COAST nursing home facility was known as COUNTRY PLACE OF CLEARWATER (COUNTRY PLACE), and was owned and operated by the Clearwater Limited Partnership, a limited partnership which is not related to CME.

4. In 1993 CME agreed to purchase, and did in fact purchase, COUNTRY PLACE from the Clearwater Limited Partnership.

5. Simultaneous with the purchase of COUNTRY PLACE, CME entered into a Sale/Leaseback Agreement with LTC Properties, Inc., a Maryland real estate investment trust which engages in the financing of nursing homes. The Purchase and Sale Agreement between Clearwater Limited Partnership and CME was contingent upon the Sale/Leaseback Agreement and the proposed Lease between CME and LTC Properties, Inc.

6. On September 1, 1993, CME simultaneously as a part of the same transaction purchased COUNTRY PLACE, conveyed the facility to LTC Properties, Inc., and leased the facility back from LTC Properties, Inc.

7. As required, CME had notified AHCA of the proposed transaction. AHCA determined that the transaction included a change of ownership and, by lease, a change of provider. CME complied with AHCA's requirements and became the licensed operator and Medicaid provider for COUNTRY PLACE. Thereafter, CME changed the name of the facility to GULF COAST.

8. After CME acquired the facility and became the licensed operator and Medicaid provider, AHCA continued to reimburse CME the same per diem reimbursement which had been paid to the previous provider (plus certain inflation factors) until CME filed its initial cost report, as required for new rate setting.

9. In the normal course of business, CME in 1995 filed its initial Medicaid cost report after an initial period of actual operation by CME. Upon review of the cost report, AHCA contended that the cost report was inaccurate and engaged in certain "cost settlement" adjustments. During this review, AHCA took the position that CME's property reimbursement should be based on FRVS methodologies rather than "cost" due to the lease.

10. In November of 1995, CME received from AHCA various documents which recalculated all components of Petitioner's Medicaid reimbursement rates for all periods subsequent to CME's acquisition of the facility. In effect, AHCA placed CME on FRVS property reimbursement. The practical effect of AHCA's action was to reduce CME's property reimbursement both retroactively and prospectively. The retroactive application would result in a liability of CME to AHCA, due to a claimed overpayment by AHCA. The prospective application would (and has) resulted in a reduction of revenues.

11. CME is substantially affected by AHCA's proposed action and by Sections I.B., III.G.2.d.(1), V.E.1.h., and V.E.4. of the Florida Medicaid Plan.

Additional Findings of Fact

12. The Florida Medicaid Plan establishes methodologies for reimbursement of a nursing home's operating costs and

patient care costs, as well as property costs. The dispute in this matter relates only to reimbursement of property costs.

13. CME as the operator of the GULF COAST nursing home facility is entitled to reimbursement of property costs in accordance with the Florida Medicaid Plan.

14. CME as the operator of the GULF COAST facility entered into a Florida Medicaid Program Provider Agreement, agreeing to abide by the provisions of the Florida Medicaid Plan.

15. The Sale/Leaseback Agreement entered into by CME and LTC Properties Inc. (LTC) specifically provides for a distinct sale of the nursing home facility to LTC. LTC holds record fee title to GULF COAST.

16. LTC, a Maryland corporation, is not related to CME, a Colorado corporation.

17. The Florida Medicaid Plan is intended to provide reimbursement for reasonable costs incurred by economically and efficiently operated facilities. The Florida Medicaid Plan pays a single per diem rate for all levels of nursing care.

18. After a nursing home facility's first year of operation, a cost settling process is conducted with AHCA which results in a final cost report. The final cost report serves as a baseline for reimbursement over the following years. Subsequent to the first year of operation, a facility files its cost report annually. AHCA normally adjusts a facility's

reimbursement rate twice a year based upon the factors provided for in the Florida Medicaid Plan. The rate-setting process takes a provider through Section II of the Plan relating to cost finding and audits resulting in cost adjustments. CME submitted the appropriate cost reports after its first year of operation of the GULF COAST facility.

19. Section III of the Florida Medicaid Plan specifies the areas of allowable costs.

20. Under the Allowable Costs Section III.G.2.d.(1) in the Florida Title XIX Plan, a facility with a lease executed on or after October 1, 1985, shall be reimbursed for lease costs and other property costs under the Fair Rental Value System (FRVS). AHCA has treated all leases the same under FRVS since that time. AHCA does not distinguish between types of leases under the FRVS method. The method for the FRVS calculation is provided in Section V.E.1.a-g of the Florida Medicaid Plan.

21. A “hold harmless” exception to application of the FRVS method is provided for at Section V.E.1.h of the Florida Medicaid Plan, and Section V.E.4 of the Plan provides that new owners shall receive the prior owner’s cost-based method when the prior owner was not on FRVS under the hold harmless provision.

22. As a lessee and not the holder of record fee title to the facility, neither of those provisions apply to CME.

23. At the time CME acquired the facility, there was an indication that the Sale/Leaseback transaction with LTC was between related parties, so that until the 1995 cost settlement, CME was receiving the prior owner's cost-based property method of reimbursement.

24. When AHCA determined that the Sale/Leaseback transaction between CME and LTC was not between related parties, AHCA set CME's property reimbursement component under FRVS as a lessee.

25. Property reimbursement based on the FRVS methodology does not depend on actual period property costs. Under the FRVS methodology, all leases after October 1985 are treated the same. For purposes of reimbursement, AHCA does not recognize any distinction between various types of leases.

26. For accounting reporting purposes, the Sale/Leaseback transaction between CME and LTD is treated as a capital lease, or "virtual purchase" of the facility. This accounting treatment, however, is limited to a reporting function, with the underlying theory being merely that of providing a financing mechanism. Record fee ownership remains with LTC. CME, as the lease holder, may not encumber title to the facility. The Florida Medicaid Plan does not distinguish between a sale/leaseback transaction and other types of lease arrangements.

27. Sections IV.D., V.E.1.h., and V.E.4., the "hold harmless" and "change of ownership" provisions which allow a new owner to receive the prior owner's method of reimbursement if FRVS would produce a loss for the new owner, are limited within the Plan's organizational context, and within the context of the Plan, to owner/operators of facilities, and grandfathered lessee/operators. These provisions do not apply to leases executed after October 1, 1985.

28. Capital leases are an accounting construct for reporting purposes, which is inapplicable when the Florida Medicaid Plan specifically addresses this issue.

29. The Florida Medicaid Plan specifically addresses the treatment of leases entered into after October 1985 and provides that reimbursement will be made pursuant to the FRVS method.

30. The Florida Medicaid Plan is the result of lengthy workshops and negotiations between the agency and the nursing home industry. The Florida Medicaid Plan complies with federal regulations.

## CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding. Section 120.56, Florida Statutes.

32. The Florida Medicaid Program is a cooperative federal and state program by which financial assistance is provided to

the state so that medical care may be furnished to needy individuals. 42 U.S.C. 1396. Participation in the program is voluntary. Participating states must comply with certain requirements imposed by the Medicaid Act and regulations promulgated by the Secretary of Health and Human Services. To qualify for federal assistance, the state must submit and have approved a plan for medical assistance 42 U.S.C. 1396(a) that contains a comprehensive statement describing the nature and scope of the State Medicaid Program. 42 C.F.R. 430.10. The state plan is required to establish, among other things, a fair method for reimbursing health care providers for the medical services provided to needy individuals. The Boren Amendment to the Act further requires that reimbursement rates are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. Wilder v. Virginia Hospital Association, 496 U.S. 498 110 S.Ct. 2510, 110 L.Ed.2 455 (U.S. 1990).

33. The Florida Medicaid Plan, Title XIX Long-Term Care Reimbursement, which provides the methodology for property cost reimbursement has been promulgated under Rule 59G-6.010, Florida Administrative Code (formerly Rule 10C-7.0482, Florida Administrative Code).

34. In general, the Florida Medicaid Plan sets reimbursement rates for providers, such as Gulf Coast, after

receipt of cost reports, on a prospective basis with an inflation factor added, and certain incentive variables included. The relevant criteria are set forth in the Plan.

35. Petitioner seeking to invalidate an existing rule has the burden of showing that the agency has acted in excess of authority or that the rule is otherwise an invalid exercise of legislative authority. Cortes v. State Board of Regents, 655 So.2d. 132 (Fla. 1st DCA 1995).

36. Specifically at issue in this case are the following provisions of the Florida Medicaid Plan:

Section III G.2.d.(1) of the Plan, which provides:

> Facilities leased on or after October 1, 1985 shall be reimbursed for lease costs and other property costs based on the FRVS per Section V.E.1.a.-g. of this plan. Allowable ownership costs shall be documented to HRS for purposes of computing the fair rental value. Facilities not reimbursed based on the FRVS per Section V.E.1.a.-g. of this plan shall not be reimbursed based on the FRVS per Section V.E.1.a.-g. of this plan, solely due to the execution of a lease agreement between related organizations under Section III.F. of this plan.
>
> * * *

Section V.E.1.h., which provides:

> A "hold harmless" provision shall be implemented to ensure that facilities existing and enrolled in the Medicaid Program at October 1, 1985, do not receive reimbursement for property and return and equity or use allowance under the FRVS method less than the property cost reimbursement plus return on equity or use

allowance given at September 30, 1985. If, after calculation of the FRVS rate, that reimbursement would be lower than depreciation plus interest costs under III.G.3.-5. of this plan, a facility shall continue to be reimbursed depreciation plus interest according to III.G.3.-5. of this plan until such time as the net difference in total payments between III.g.3.-5. and FRVS is -0-.

* * *

Section V.E.4., which provides:

a. Facilities that undergo a change of ownership on or after October 1, 1985, shall be reimbursed for property based upon the provisions contained in this section. It is the Department's intent that, to the extent possible, the new provider shall receive essentially the same reimbursement for property costs as the previous provider. Therefore, unless stated otherwise in b. through f. below, the new provider's reimbursement shall be based on 1.-3. above [the FRVS formula].

b. If the previous owner of a facility was being paid depreciation plus interest under the hold harmless provision of 1.h. above, the new owner shall also receive depreciation plus interest per Section III.G. unless he requests the Department, in writing, to begin FRVS payments instead. The FRVS depreciable basis shall remain the same as that of the previous owner; however, the new owner's mortgage interest rate shall be used to calculate the interest expense allowed, subject to the limitations in 1.f. above.

* * *

Section I.B., which provides:

For new providers who enter the program operating a facility that had been previously operated by a Medicaid provider,

> the property reimbursement rate shall be established per Section V.E.4. of this plan.

37. Petitioner contends that under the circumstances of this case, those provisions which do not distinguish between various types of leases are vague, intentionally inconsistent, fail to establish adequate standards, are arbitrary, and therefore constitute an invalid exercise of delegated legislative authority. Section 120.52(8), Florida Statutes, provides:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated authority if any one or more of the following apply:
> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
> (d) The rule is vague, fails to establish adequate standards for agency decision, or vests unbridled discretion in the agency; or
> (e) The rule is arbitrary or capricious.

38. Under Section III.G.2.d.(1) in the Plan, a facility with a lease executed with a new provider after October 1, 1985, shall be reimbursed for lease costs and other property costs under the Fair Rental Value System (FRVS). Under the FRVS

methodology, all leases are treated the same under the rule, and the agency has no arbitrary discretion to treat providers disparately. The evidence establishes that those provisions represent the result of negotiated rulemaking with industry associations, and the challenged rule provisions were validly adopted under the law, and are fair and equally applicable to all affected providers.

39. Petitioner did not meet its burden of proof to show that the FRVS method was improperly applied to its reimbursement rate following a simultaneous series of sale/leaseback transactions which culminated with CME holding a leasehold interest in the facility. Moreover, the evidence does not support the conclusion that the provisions of the Plan which distinguish between record fee title holders and lessees are arbitrary or capricious.

40. The promulgation and implementation of Rule 59G-6.010 is provided for under Section 409.919, Florida Statutes. The Plan further complies with federal regulations. The adoption of the Plan by rule did not exceed delegated legislative authority on the part of the agency. There is clearly a rational basis which underlies the negotiated formulation and adoption of FRVS under the Plan.

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition to Determine Provisions of the Florida Medicaid Plan invalid as promulgated under Rule 59G-6.010, Florida Administrative Code, is DENIED.

DONE and ORDERED this 5th day of February, 1997, in Tallahassee, Florida.

RICHARD HIXSON
Administrative Law Judge
Division of Administrative Hearings
DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 1997.

COPIES FURNISHED:

Alfred W. Clark, Esquire
Post Office Box 623
Tallahassee, Florida 32302

Wayne Mitchell, Esquire
Kim A. Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Suite 3400
Tallahassee, Florida 32308

Carroll Webb, Executive Director
Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliot Building
Tallahassee, Florida 32399-0250

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings, and a second copy accompanied by filing fees prescribed by law with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.

==========

DISTRICT COURT ORDER

==========

Tallahassee, Florida 32399-1850
Telephone (904) 488-6151

November 10, 1997
CASE NO: 97-00777 97-01589

L.T. CASE NO. 96-3593RX

Consulting Management and Education, Inc.
Appellant(s),

v.

Agency for Health Care Administration
Appellee(s).

BY ORDER OF THIS COURT:

Appeal dismissed pursuant to Rule 9.350(b), Fla. R. App. P.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

John S. Wheeler, Clerk

By: _____ (SEAL)
Anne Moore
Deputy Clerk

Copies:

Alfred W. Clark
Ann Cole, Clerk
Kim Kellum